

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

MAR - 2 1994

In the Matter of)
)
Implementation of Sections 11)
and 13 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)
)

MM Docket No. 92-264

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

MOTION FOR LEAVE TO FILE RESPONSE TO REPLIES

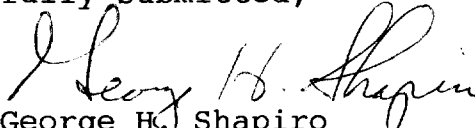
On February 14, 1994, Viacom International Inc. ("Viacom") submitted Comments on the Petition for Reconsideration ("Reconsideration Comments") filed in the above-referenced proceeding by the Center for Media Education and the Consumer Federation of America. In their reply filings made on February 22 and 24, 1994, four parties -- Liberty Media Corporation ("Liberty"), Time Warner Entertainment Company, L.P. ("Time Warner"), Turner Broadcasting System, Inc. ("Turner"), and Black Entertainment Television, Inc. ("BET") -- attack Viacom and/or the positions it took in its Reconsideration Comments. Since the normal pleading schedule provided for in the Commission's rules ended with the filing of replies, Viacom has not had an opportunity within that pleading schedule to respond to those attacks. It is therefore filing this Motion requesting leave to respond briefly to certain points made in the replies of Liberty, Time Warner, Turner and BET. Consideration of Viacom's Response will result in a more complete record, will not prejudice any party, and will not delay resolution of this proceeding.


No. of Copies rec'd
List ABCDE

029

For the foregoing reasons, Viacom requests that the Motion for Leave to File Response to Replies be granted. Viacom's Response is attached hereto.

Respectfully Submitted,


/s/ George H. Shapiro
George H. Shapiro


/s/ Robert D. Primosch
Robert D. Primosch

ARENT, FOX, KINTNER, PLOTKIN
& KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
Telephone: (202) 857-6022

Its Attorneys

Date: March 2, 1994

In the Matter of)
)
Implementation of Sections 11) MM Docket No. 92-264
and 13 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)
)

RESPONSE OF VIACOM INTERNATIONAL INC.

2. First, while attacking Viacom for filing its Reconsideration Comments in order to gain commercial advantage,^{1/} the replying parties press arguments that are themselves quite obviously profit-motivated. Tele-Communications, Inc. ("TCI") and Liberty -- which are in the process of

^{1/} See e.g. Liberty Reply at 2.

recombining -- have attributable interests in TBS and BET. The only other party responding to Viacom's Reconsideration Comments is Time Warner, the second largest cable operator in the country and, other than TCI, the one closest to becoming subject to the rule changes Viacom has supported. The replying parties are therefore in no position to dismiss Viacom's Reconsideration Comments as commercially driven. The issue is not whether Viacom's Reconsideration Comments or the replies of Liberty, TBS, BET and Time Warner were filed for their commercial advantage (comments of commercial entities participating in rule making proceedings are invariably to their commercial advantage), but whether adoption by the Commission of the proposals Viacom has supported would serve the public interest, the very issue addressed at length in Viacom's Reconsideration Comments.

3. Second, Viacom is attacked in the Reply Comments for taking positions inconsistent with those in its earlier filings. Since Viacom has not previously taken a position on horizontal ownership limits, its support for a reduced horizontal ownership limit in its Reconsideration Comments is not inconsistent with its prior filings. In any event, TCI's anticompetitive conduct, including its monopoly leveraging, led Viacom, after the comment periods in this proceeding closed, to file its antitrust complaint against TCI, Liberty and others. These market conditions have also convinced Viacom that rules limiting the size of the largest cable operators are necessary to limit the potential for anticompetitive injury in the distribution of

programming services.^{2/} And although Liberty finds Viacom's antitrust claims "ironic" in light of Viacom's size,^{3/} that size has enabled Viacom to challenge the anticompetitive practices of its largest customer, TCI.^{4/}

4. With respect to channel occupancy limits, notwithstanding the replying parties' protestations, Viacom has not departed from the positions it has taken earlier in this proceeding, but has refined them to address the antitrust concerns set forth in Viacom's Reconsideration Comments regarding horizontal concentration. Viacom thus supports reduced channel occupancy limits only for horizontally concentrated cable operators and then only if the Commission does not adopt Viacom's proposal for horizontal ownership limits.

5. Third, in the interest of brevity, Viacom will not address each mischaracterization or distortion contained in the Reply Comments, but it does wish to respond to the following;

a. In its intemperate reply comments, TBS suggests that the District of Columbia cable system, in which TCI has an attributable interest, would have to delete five program

^{2/} For this reason, Viacom's Reconsideration Comments are not inconsistent with the First Amendment arguments Viacom made in its earlier filings. The First Amendment does not protect anticompetitive restraints on distribution. See Associated Press v. U.S., 326 U.S. 1 (1945). It is to those types of restraints that Viacom's Reconsideration Comments are directed.

^{3/} See Liberty's Reply Comments at n. 3, p. 4.

^{4/} See Viacom's Reconsideration Comments at 6 and n. 6.

networks from a list of 14 networks specified by TBS.^{5/} However, TBS has ignored the fact that, from the outset of this proceeding, Viacom has recognized that channel occupancy limits should not apply to cable services that are widely carried by non-affiliated cable systems."^{6/} Viacom therefore proposed in its earlier filings in this proceeding that carriage of a program service by cable systems not under common control with the programmer that serve more than 50% of cable subscribers nationwide (excluding cable subscribers to the commonly-owned systems) should not be counted toward channel occupancy limits, and Viacom continues to support such an exemption.^{7/} Application of such an exemption would likely exempt from the channel occupancy limits at least TBS, TNT, CNN, Headline News, The Discovery Channel, and The Family Channel, and possibly others, from the list of program services the District of Columbia cable system might have to delete. TBS also includes in its list of affected program services Home Team Sports, a regional channel which is not subject to the

^{5/} TBS Response to Viacom's Comments at 2. The networks identified by TBS are TBS, TNT, CNN, Headline News, The Cartoon Network, The Discovery Channel, The Learning Channel, American Movie Classics, QVC Network, Encore, The Family Channel, Court TV, Black Entertainment Television, and Home Team Sports.

^{6/} Viacom's Comments filed February 9, 1993 at 5. See also Viacom's Further Reply Comments filed May 12, 1993 at 4-5; Viacom's Comments filed August 23, 1993 at 5-6.

^{7/} See Viacom's Reconsideration Comments at n. 16, at pp. 18-19.

channel occupancy limits. TBS has thus grossly exaggerated the effect of Viacom's proposal on channel occupancy limits on the District of Columbia cable system.

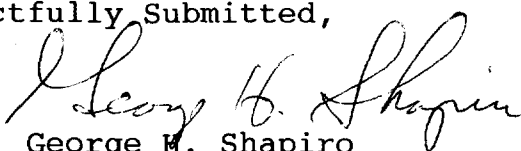
b. Time Warner criticizes Viacom's reliance on Viacom International Inc. v. Time Inc., 785 F.Supp. 371 (S.D.N.Y. 1992) ("Time Inc."), in the context of Viacom's discussion of monopoly leveraging.^{8/} Contrary to Time Warner's assertion, Viacom did not argue that Time Inc. held that a cable operator having less than 10% of all cable subscribers nationally had monopoly power or violated the antitrust law. The case holds, as Viacom stated, that such an operator "may inflict antitrust injury on non-affiliated pay programming services."^{9/} As a matter of regulatory policy, Viacom believes that the danger of monopoly leveraging at concentration levels above 15% is sufficiently great that public interest considerations warrant adoption of a rule that will mitigate that danger.

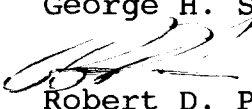
6. For the foregoing reasons and the reasons stated in its Reconsideration Comments, Viacom urges that the Commission grant the Petition for Reconsideration filed by the Center for Media Education and the Consumer Federation of America to the limited extent suggested in Viacom's Reconsideration Comments.

^{8/} Time Warner Reply at 5-6.

^{9/} Viacom Reconsideration Comments at 10 (emphasis supplied).

Respectfully Submitted,


/s/ George H. Shapiro
George H. Shapiro


/s/ Robert D. Primosch
Robert D. Primosch

ARENT, FOX, KINTNER, PLOTKIN
& KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
Telephone: (202) 857-6022

Its Attorneys

Date: March 2, 1994

CERTIFICATE OF SERVICE

I Maureen C. Gordon hereby certify that on this 2nd day of March, 1994, copies of the foregoing "Motion For Leave To File Response to Replies" and "Response of Viacom International Inc." were served by first-class mail, postage prepaid on the individuals listed below:

Angela J. Campbell
Institute for Public Representation
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Michael E. Glover
The Bell Atlantic Companies
1710 H Street, N.W.
Washington, D.C. 20006

Michael H. Hammer
Willkie Farr & Gallagher
Three Lafayette Center
1155 - 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
Counsel for Telecommunications, Inc.

Robert H. Hoegle
Timothy J. Fitzgibbon
Carter, Ledyard & Milburn
1350 I Street, N.W., Suite #870
Washington, D.C. 20005
Counsel for Liberty Media Corporation

Stephen S. Madsen
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Counsel for Time Warner Entertainment
Company, L.P.

Bruce D. Sokler
Lisa W. Schoenthaler
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite #900
Washington, D.C. 20004
Counsel for Turner Broadcasting System, Inc.

David M. Silverman
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for Black Entertainment
Television, Inc.


Maureen C. Gordon